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No. 07-1562

FILED
AUG 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JANE H. CHUN, *et al.*,

Petitioners,

v.

NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION FOR RESPONDENT DRAEGER SAFETY DIAGNOSTICS, INC.

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QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. § 1257(a), this Court has jurisdiction to review the New Jersey Supreme Court's interlocutory decision, in a pre-trial evidentiary hearing on the reliability of a scientific breath testing instrument, that calibration and maintenance documents relating to the device — which do not attest to facts that are an element of the offense and are prepared and maintained in the ordinary course of business by authors who did not know whether such documents would ever be used in any prosecution at all, and, even if they would be used, whether they would be used in connection with the prosecution of any specific individual or any specific instance of charged driving while intoxicated ("DWI") — are not "testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004).

2. If this Court has jurisdiction, whether this Court should review the New Jersey Supreme Court's decision.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Draeger Safety Diagnostics, Inc., is wholly-owned by Draeger Safety, Inc.

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STATEMENT OF THE CASE

The Petition arises out of the New Jersey Supreme Court's determination, after extensive pre-trial hearings held pursuant to Rule 104 of the New Jersey Rules of Evidence, that the Alcotest® 7110 MK III-C evidential breath testing instrument is scientifically reliable under the "general acceptance" standard first set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and that Alcotest® results can be admitted in evidence at trial during the Petitioners' DWI cases. The trials in Petitioners' cases, after the New Jersey Supreme Court's remand following the interlocutory decision that Petitioners now seek to challenge in this Court, have not yet occurred.

In its interlocutory decision, the New Jersey Supreme Court held that certain calibration and maintenance documents created and maintained in the ordinary course of business, which show the good working order of the particular Alcotest® instrument used to test the Petitioners' breath samples when their breath tests occurred, can be admitted at trial without the need for testimony from the documents' authors. In this Court, Petitioners challenge that holding, claiming that the documents are "testimonial" under this Court's decision in *Crawford*.

Draeger Safety Diagnostics, Inc. ("DSDI"), the manufacturer of the Alcotest® 7110 MK III-C, Intervenor below and one of the respondents in this Court, respectfully submits this opposition to the Petition.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO JURISDICTION IN THIS COURT TO REVIEW THE NEW JERSEY SUPREME COURT'S INTERLOCUTORY DECISION

It is well settled that under 28 U.S.C. § 1257(a) this Court only has jurisdiction to review a state court decision that is "final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). "[T]he finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson*, 522 U.S. at 81 (citing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Petitioners concede, as they must, that their "cases have not been finalized." (Petition at 20.[1]) Yet, without citation to any law, they assert, contrary to well-established finality jurisprudence, that this Court should nevertheless grant certiorari and review the New Jersey Supreme Court's interlocutory determination of the pre-

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[1] The Petition for Certiorari is cited herein as "Petition." The Appendix to the Petition is cited herein as "Appendix."

trial evidentiary issue at bar. This Court should decline Petitioners' extraordinary request.

As this Court recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), there are but four established exceptions to the finality rule under which certain otherwise interlocutory "state court judgments can be treated as final for jurisdictional purposes." *Pierce County v. Guillen*, 537 U.S. 129, 140-141 (2003)(citing *Cox*, 420 U.S. 469). None of the four *Cox* exceptions apply in this case.

The first *Cox* exception permits review in "those cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. Here, as Petitioners concede, their trials on the merits are yet to come. In those trials, there could, and likely will, be a myriad of issues presented – legal and factual – including the technical competence of the officer who administered the breath test at issue. The findings on those issues will determine the trials' outcome and Petitioners' ultimate guilt or innocence. That result, guilt or innocence, is not "preordained" or "concluded" as a result of the New Jersey Supreme Court's decision, which merely determined, in a pre-trial evidentiary hearing held under Rule 104 of the New Jersey Rules of Evidence, that the Alcotest® 7110 MK III-C is scientifically reliable. Thus, the first exception to the finality rule does not apply.

The second *Cox* exception is for "cases . . . in which the federal issue, finally decided by the highest court in

the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Here, if Petitioners ultimately prevail on the merits in their trials, which are yet to come, their claim of injury under *Crawford* would be moot and thus not survive. The second *Cox* exception therefore also does not apply.

The third exception is for "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. If Petitioners ultimately lose on the merits they can still raise their federal arguments on appeal, and, after final judgment is entered, this Court could then review the matter. The third *Cox* exception thus also does not apply. *See Guillen*, 537 U.S. at 141 n.5 (citing *Jefferson*, 522 U.S. at 82-83) (dismissing writ of certiorari for lack of jurisdiction under finality rule).

The fourth *Cox* exception is for cases in which "reversal of the state court on the federal issue would be preclusive of any further litigation;" not where the state court's ruling "merely control[s] the nature and character of, or determine[s] the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 482-483. Here, the state court's ruling was an interlocutory, pre-trial decision on the admissibility of certain scientific evidence – breath test results generated by the Alcotest® 7110 MK-IIIC – in Petitioners' DWI cases. Petitioners are challenging in this Court just one aspect of that ruling: the New Jersey

Supreme Court's holding that certain "foundational documents," *e.g.*, business records "evidencing the good working order" of the instrument at the time of the test (Appendix at 121a, *State v. Chun*, 194 N.J. 54, 145 943 A.2d 114, 168 (2008)) as well as "evidence of [the operator's] qualifications" (Appendix at 115a, 194 N.J. at 141, 943 A.2d at 166), are not testimonial and thus do not implicate Petitioners' *Crawford* rights.

Reversal of the state court's ruling on this issue would not preclude further litigation. To the contrary, it would invite more litigation. First, the New Jersey Supreme Court could well hold that the Alcotest® is scientifically reliable and the test results it generates could be introduced as evidence, even without the challenged "foundational documents." Second, the Sixth Amendment, and thus, *Crawford*, only applies in "criminal prosecutions." As the New Jersey Supreme Court noted in its decision, in expressly declining to consider whether the Confrontation Clause applies in a quasi-criminal proceeding, violations of New Jersey's Motor Vehicle Code, such as the DWI cases at bar, are quasi-criminal, not criminal prosecutions. Appendix at 109a n.41, 194 N.J. at 137 n.41, 943 A.2d at 144 n.41. Thus, even if this Court were to find that the foundational documents are "testimonial," further litigation will perforce ensue in which the New Jersey Supreme Court would have to analyze and decide whether the Confrontation Clause applies in these quasi-criminal cases. In that litigation, the New Jersey Supreme Court could well hold that there is no Confrontation Clause right in quasi-criminal matters, thus effectively retroactively mooting this Court's

holding that the documents at issue are "testimonial" and rendering this Court's decision merely advisory. Therefore, the fourth and final *Cox* exception also does not apply.

There is simply no jurisdiction in this Court under 28 U.S.C. 1257(a) and this Court should therefore deny the Petition.

II. THE NEW JERSEY SUPREME COURT PROPERLY HELD THAT THE "FOUNDATIONAL DOCUMENTS" AT ISSUE ARE NON-TESTIMONIAL

In *Crawford*, this Court held that the Confrontation Clause applies only to "testimonial" hearsay evidence and expressly noted that "business records" are not testimonial and thus outside the ambit of Constitutional protection. 541 U.S. at 56. The meaning of "testimonial" was clarified in *Davis v. Washington*, 547 U.S. 813 (2006), in which this Court limited confrontation rights to the results of "interrogations solely directed at establishing the facts of a past crime" as opposed to descriptions of present facts, which do not get Constitutional protection. 547 U.S. at 826-27.

Petitioners direct their *Crawford* challenge solely to the portion of the decision below that permits admission of the following "foundational documents" without testimony from the documents' authors:

> (1) the most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the

> credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests.

Appendix at 6. *See also* Appendix at 121a, 194 N.J. at 145, 943 A.2d at 168. In holding that these documents are business records and do not implicate *Crawford* or *Davis*, the New Jersey Supreme Court noted that the documents report present, as opposed to past, facts and also that they "are *not generated or prepared in order to establish any fact that is an element of the offense.*" Appendix at 119a, 194 N.J. at 144, 943 A.2d at 167 (emphasis added). Indeed, the documents at issue are created without an eye towards using them, in the event such use will ever become necessary, in any particular prosecution of any specific defendant or any specific instance of a DWI offense.

The New Jersey Supreme Court's decision was thus correct, and, as that court noted, consistent with the "great majority of jurisdictions that have considered this, or similar questions relating to the foundation documents for scientific testing devices." Appendix at 118a, 194 N.J. at 143, 943 A.2d at 167 (citing *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, 476-77 (App.2006) (maintenance and calibration records for breath testing machine are routine business records that are not testimonial); *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706, 707, 709 (2006) (inspection certifications are business records and are not testimonial); *People v. Kim*, 368 Ill.App.3d 717, 307 Ill.Dec. 92, 859 N.E.2d 92,

93-94 (2006), *appeal denied*, 224 Ill.2d 589, 312 Ill.Dec. 660, 871 N.E.2d 60 (2007) (affidavit certifying that device was tested is non-testimonial); *Jarrell v. State*, 852 N.E.2d 1022, 1026 (Ind.Ct.App.2006) (breath test device certification is not testimonial); *Napier v. State*, 820 N.E.2d 144, 149 (Ind.Ct.App.2005) (inspection and operator certifications are not testimonial); *Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky.2006) (notations regarding maintenance and testing of device are not testimonial); *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176, 181-83 (2007) (simulator solution certificate is not testimonial); *People v. Lebrecht*, 13 Misc.3d 45, 823 N.Y.S.2d 824, 826-27 (Sup.2006) (calibration/ maintenance report and simulator solution certification are not testimonial); *State v. Norman*, 203 Or.App. 1, 125 P.3d 15, 18-20 (2005), *review denied*, 340 Or. 308, 132 P.3d 28 (2006) (certificates of accuracy are not testimonial). *But see Shiver v. State*, 900 So.2d 615, 618 (Fla.Dist.Ct.App.2005) (breath test affidavit, including portion used to show that device had required maintenance, is testimonial)).

The same holds true in the vast majority of United States Circuit Courts of Appeal that have confronted this issue similar contexts. *See, e.g., United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006)(drug test results are admissible business records); *United States v. De La Cruz*, 514 F.3d 121, 133 (1st Cir. 2008)(business records are expressly excluded from the reach of *Crawford*); *United States v. Feliz*, 467 F.3d 227, 233-34 (2d Cir.2006) ("business records are fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence"); *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007)

("after *Crawford*, business records are not testimonial in nature and their admission at trial is not a violation of the Confrontation Clause"); *United States v. Urqhart*, 469 F.3d 745, 749 (8th Cir. 2006) ("a [business record] is nontestimonial evidence under *Crawford*"); *United States v. Hagege*, 437 F.3d 943 (9th Cir.), *cert. denied* __ U.S. __, 127 S.Ct. 85 (2006) ("[b]usiness records fall outside the core class of "testimonial evidence," and thus are not subject to the absolute requirement of confrontation established in *Crawford*").

Here, *a fortiori*, where the documents at issue are business records and were created: (i) when there was no active investigation, (ii) without knowledge that they would ever be used and (iii) without an eye towards using them, if they will ever used, in any specific case or with respect to any particular defendant or specific offense, the documents are non-testimonial and do not implicate any Confrontation Clause concerns.

III. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

Petitioners do not assert that the New Jersey Supreme Court's decision conflicts with the decision of another state court of last resort, a United States Court of Appeals, or of this Court. To the contrary, the New Jersey Supreme Court's ruling in this case is in accord with other cases in this Court – *Crawford* and *Davis* – and with the vast majority of other state and United States Courts of Appeals' decisions on similar questions.

Moreover, the decision in *Crawford* is not a question of federal law of sufficient importance to rise the level

required for review under Rule 10 of this Court's Rules. Indeed, in *Whorton v. Bockting*, __ U.S. __, 127 S.Ct. 1173 (2007), this Court expressly recognized that its decision in *Crawford* was merely "procedural and not substantive," and did not "implicat[e] the fundamental fairness and accuracy of the [underlying] criminal proceeding," when it declined to apply *Crawford* retroactively to final judgments on collateral review under the retroactivity framework set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *See Whorton*, __ U.S. at __, 127 S.Ct. at 1180-81.

Finally, Petitioners' analysis seeks to expand this Court's decision in *Crawford* to illogical extremes. If Petitioners' argument is accepted the only way to introduce evidence obtained using any scientific instrument would be to bring every person who ever had anything to do with calibrating and testing the instrument at issue – and, perhaps, assembling, storing and maintaining it, as well as writing the software for it (in the case of microprocessor-driven instruments like the Alcotest®, or mass spectrometers and gas chromatographs), as well as anyone responsible for any testing of the equipment and methods used in the tests of the tests; *i.e.*, any person involved in any way in any "foundational" type of step connected with preparing the device properly to function – into court to testify in person regarding every step in that process no matter how far attenuated from the elements of the charged offense and how burdensome to the prosecution. Much of the burden of such testimony would fall on individuals employed by manufacturers, such as DSDI; small companies that are ill-equipped to deal with the burden that such a requirement would place upon them, both in terms of the financial and time commitment involved.

Indeed, for virtually all such companies, at least some of the component parts and electronics used in their devices are manufactured abroad. Yet, if Petitioners' analysis is to be credited, all such foreign employees and subcontractors involved in all steps of the manufacturing of the device, all of whom may have relevant foundational evidence to offer – how were the parts soldered together? was it particularly humid on the day they assembled the device at issue? did all the people on the assembly line get the appropriate amount of sleep the night before? were they properly trained in assembly techniques? all of which a defendant might conceivably argue goes to the reliability of the build process and the results the device renders; and on and on and on with no end – would be fair game and would have to appear in court to testify in person. That would sound the death knell for the evidential breath testing industry. After all, which government body would spend money to buy evidential breath testers if, to use the device's results in court, they have to produce all of the witnesses in court in person that Petitioners claim are required every time there is a trial.

Moreover, the precedent that Petitioners seek in this case would destroy government's ability to use sophisticated and reliable scientific forensics evidence, the very best, objective evidence upon which to rely in considering an accused's guilt or innocence, not just in DWI cases, but rather in all cases. For in all cases that rely on such evidence – and today, that is virtually all criminal cases – the burden on the prosecution, the courts and the manufacturers of scientific instruments would be untenable. Trials and dispositions would slow to a crawl and dockets would back up while the cost to

local government and manufacturers of procuring the attendance of witnesses to testify in court on background foundational issues that are many times attenuated from the elements of the actual offense would skyrocket. As a result, prosecutors would be forced to abandon the best and most reliable objective evidence there is and revert exclusively to "low-tech," and far less reliable, subjective evidence, such as eyewitness testimony that is subject to the vagaries of human beings' aural and visual abilities and the vicissitudes of human memory; quite an ironic and non-sensical twist in a Constitutional challenge founded on the framers' efforts to assure an accused the fairest possible trial.

If there is any "compelling reason" here at all, it is a compelling reason to deny certiorari, which this Court should do.

CONCLUSION

For all the foregoing reasons, and for those set forth in the New Jersey Supreme Court's decision, this Court should deny the Petition.

Respectfully submitted,

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